U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: April 23, 2001

Case No.: **2000-INA-39**
CO No.: **P1996-CA-0907794**

In the Matter of:

CORVETTE DINER
Employer,

on behalf of:

EDUARDO ROMERO-CASPETA
Alien.

Appearance: Gary D. Spencer, Esq.
for Employer and Alien

Certifying Officer: Pandora Wong
San Francisco, California

Before: Vittone, Burke and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Eduardo Romero-Caspeta ("Alien") filed by Corvette Diner ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Statement of the Case

On July 25, 1995, Employer filed an Application for Alien Employment Certification for the position of "Cook Assistant." After discussions with the State Department of Labor ("EDD"), an amended application was filed on July 7, 1998. (AF 29-138). The duties as amended were as follows:

> Cook assistant to prepare a wide range of menu items. Use and knowledge of standard restaurant equipment and utensils. Must order inventory supplies for the shift in the absence of the cook. [*sic*]

(AF 29). Employer required one year of college and two years of experience in the job offered, as well as a San Diego Department of Health Foodhandler's card. *Id.*

On October 15, 1998, the CO issued her Notice of Findings ("NOF"), indicating her intent to deny the application. (AF 25-27). In the NOF, the CO stated that "it appears that U.S. workers were rejected for other than lawful job-related reasons[.]" First, in its recruitment report, Employer had failed to address ten applicants that had been referred during recruitment. Further, as to the applicants that were addressed, the reported results were "subjective, conjectural, or unsubstantiated." The CO listed specific examples as to this deficiency, applicants Flores, Ferrari and Herrera. The CO then informed Employer that it could correct these deficiencies by explaining "with specificity, the lawful job-related reasons for rejecting each U.S. worker referred[.]" Further, the CO specifically informed Employer that inability to contact an applicant at this time would not be considered a valid reason for rejection. (AF 27).

After receiving an extension of time, Employer mailed its rebuttal on November 19, 1998. (AF 20-22). The rebuttal first addressed the issue of the ten applicants that were not previously addressed. Employer argued that these applicants were informed by EDD to come by the restaurant, and that it was never given their personal information. As such it had no means to contact the applicants. One of the applicants came to the restaurant, and he was hired as another assistant cook had quit at that time. The remainder of the applicants did not appear, and Employer was unable to find their phone numbers in information. (AF 20). As to Flores, Employer alleged that his experience is only that of a prep cook, which would not qualify him for the position of Cook Assistant. Employer reiterated its position that Ferrari was an undesirable candidate due to unverifiable work documents and the fact that she would be working two jobs if she took the position. Finally, Employer stated that Herrera was not officially part of the recruitment process, as she was not referred by anyone. However, she stated when contacted that she was going back to school and was not interested in working at this time. (AF 21).

On March 9, 1999, Employer issued a Final Determination ("FD") denying certification. (AF 12-14). The FD did not address the issue of failure to contact ten applicants, instead stating that the sole issue in the NOF was the lack of specificity in the rationale for rejecting the three applicants. The FD then describes each of the three applicants and the holdings of the NOF. However, when the FD turns to discuss the findings of the CO, it references only the rejection of

applicant Ferrari. Specifically, the CO found that "[i]f it is the applicant's choice to work two jobs, that in itself is not disqualifying, nor is the employer in a lawful position to reject her for working two jobs." The CO held that potential for fatigue was not a consideration absent a state or federal safety regulation showing that the holding of two jobs was impermissible. (AF 13).

On April 1, 1999, Employer filed a *Request for Reconsideration and/or Appeal to BALCA*. (AF 1-11). No ruling was made on this motion.[1] Instead, the case file was forwarded to this office. Accordingly, the Board ordered Employer to indicate whether it would prefer to have the file remanded for consideration of the reconsideration request or proceed with the appeal before the Board. At that time, Employer requested that the appeal proceed before the Board.

Discussion

In order for the Board to review an issue, it must be preserved in the FD by the CO. *Loew's Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (*en banc*). Thus, where the FD does not respond to issues raised in the rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. *See Dr. Mary Zumot*, 1989-INA-35 (Nov. 4, 1991); *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989). As such, the only issue presented to the Board is whether Employer properly justified its rejection of Applicant Ferrari.

The statutory and regulatory scheme of Permanent Labor Certification is to protect the jobs and wages of U.S. workers. Accordingly, the regulations require that if U.S. workers have applied for a job opportunity, the employer must clearly document that they were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(6). When the CO finds that one of the U.S. applicants is otherwise qualified, able, and available, the employer must offer the job to the U.S. applicant. In the present case, the CO found that Applicant Ferrari was otherwise qualified and available for this position. We do not agree.

First, the CO's finding presumes that Applicant Ferrari is qualified. In the NOF, the CO stated that it would consider Applicant Ferrari qualified until conclusively proven otherwise. However, nothing contained in the record presents Applicant Ferrari's specific qualifications. Further, on the follow-up questionnaire to the CO, Applicant Ferrari merely answered that she felt that she was qualified for the position with no other information provided. In general, an applicant is considered qualified for a job only if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd.*, 1988-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 1987-INA-635 (Jan. 12, 1988). As Applicant Ferrari failed to submit a resume, the record contains no information as to her exact qualifications. Further, the interview notes from her interview indicate that she does not possess the minimum requirements. We thus find that the record does not indicate that she is qualified. Where the applicant is not clearly qualified based on

[1]There is a handwritten note on the request for reconsideration that reads as follows: "Reconsideration denied forward to ALJ." However, there is no indication that this notice was ever served upon the parties. (AF 1).

information in the record, the burden shifts to the CO to explain adequately why the U.S. applicant is qualified. *Houston Music Institute, Inc.*, 1990-INA-450 (Feb. 21, 1991). The CO has offered no information that would prove that Applicant Ferrari is otherwise qualified, and thus the CO's finding that Employer unlawfully rejected Applicant Ferrari is in error.

Even if we presume that Applicant Ferrari is otherwise qualified, the record does not demonstrate that she is available. The CO does not dispute that Applicant Ferrari is going to keep her current job. Instead, the CO finds that working twelve hours a day[2], excluding commuting time to each job, would not disqualify the applicant as unavailable, as long as the applicant is interested. We decline to reach such a holding. The situation as described is much different from one where the applicant indicates his or her willingness to resign their current job if offered the position. Here, the applicant is clearly indicating her unwillingness to work solely for employer. The Board has not held that an employer is required to accept an applicant that will be working two jobs. In fact, the Board has specifically stated that working two jobs may be considered a job-related reason for rejection. *See Production Tool Corp. of Wisconsin*, 1988-INA-210 (Nov. 9, 1989). Moreover, the CO has not cited any legal authority for its proposition. Accordingly, the following order shall enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED**.

Entered at the direction of the panel by:

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John M. Vittone
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not

[2]The CO in the FD notes that the applicant would be working 8 hours a day with Employer, not twelve. This appears to be a misreading of Employer's rebuttal. Employer, in its rebuttal merely stated that the Alien would work a total of 12 hours a day in the two jobs, not just with Employer.

favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.